

HOUSE BILL REPORT

HB 1862

As Reported by House Committee On:
Judiciary

Title: An act relating to parties liable for damages in actions under chapter 7.70 RCW.

Brief Description: Changing provisions relating to parties liable for damages in actions under chapter 7.70 RCW.

Sponsors: Representatives Lantz, Flannigan, Morrell, Springer, Kirby, Cody, Williams, Miloscia, Upthegrove, Linville, O'Brien, Campbell and Kagi.

Brief History:

Committee Activity:

Judiciary: 2/14/05, 2/28/05 [DP].

Brief Summary of Bill

- Changes the entities to whom fault may be allocated in a medical malpractice action.
- Eliminates a health care provider's joint liability for non-economic damages in a medical malpractice case.
- Changes the rules relating to admissibility of collateral source payments in a medical malpractice action.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 6 members: Representatives Lantz, Chair; Williams, Vice Chair; Campbell, Kirby, Springer and Wood.

Minority Report: Without recommendation. Signed by 3 members: Representatives Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; and Serben.

Staff: Edie Adams (786-7180).

Background:

Determination of Percentages of Fault in Tort Cases

In a tort case based on fault, the trier of fact is required to assign a percentage of the fault to "every entity which caused the claimant's damages." (An exception is provided for entities

who are immune under the state's Industrial Insurance Law.) These assigned percentages must add up to 100 percent. The "entities" to whom fault must be assigned include:

- the claimant;
- defendants;
- entities released by the claimant;
- entities who are immune from liability; and
- entities who have an individual defense against the claimant.

This list of entities to whom fault may be assigned is potentially longer than the list of defendants against whom judgment may be entered in a given case. Only defendants who are parties to the case and against whom judgment is entered are responsible for paying the claimant's damages. Defendants pay damages in proportion to their percentages of fault.

Joint and Several Liability

With some exceptions, a defendant in a tort case is responsible only for his or her own percentage of fault in causing the claimant's harm. In some instances, however, multiple defendants may be "jointly and severally" liable for the whole of the claimant's damages. This joint and several liability means that any one defendant can be required to pay all of the damages. (The paying defendant then has a "right of contribution" against any other defendant to recover shares of the damages based on each defendant's fault.) One of the instances in which joint and several liability applies is when the claimant was not at fault in causing his or her own harm.

The damages that may be awarded to a claimant include payments for a variety of harms. Some of these are "economic" damages which are defined as "objectively verifiable monetary losses" such as lost earnings and out-of-pocket expenses required to deal with the harm done. "Non-economic damages," on the other hand, are defined as "subjective, nonmonetary losses" and include:

- pain, suffering, inconvenience, mental anguish, disability, or disfigurement;
- emotional distress;
- loss of society and companionship;
- loss of consortium;
- injury to reputation;
- humiliation; and
- destruction of the parent-child relationship.

Collateral Source Payments

In the context of tort actions, "collateral sources" are sources of payments or benefits available to the injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage, disability insurance, or sick leave. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury. The rationales provided by the courts for the rule include: (1) that the wrongdoer should not benefit from collateral payments

made by third parties to the person he or she has wronged and thereby escape responsibility for the harm; and (2) that evidence of collateral sources could possibly prejudice the fact finder in determining the injured person's damages.

The traditional collateral source rule has been modified in medical malpractice actions. In a medical malpractice action, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

Summary of Bill:

Several features of tort law are changed with respect to medical malpractice actions. These changes include adjusting the way percentages of fault are assigned, limiting the application of joint and several liability with respect to a health care provider's responsibility for non-economic damages, and changing types of collateral source payments that may be introduced into evidence.

Determination of Percentages of Fault in Tort Cases

The requirement that any entity causing a claimant's damages, including entities who are not parties to the lawsuit, must be assigned a percentage of the total fault for a claimant's damages is revised. In medical malpractice cases, 100 percent of the fault is to be assigned only to claimants, defendants, and third-party defendants who are parties to the action, entities who are immune, and entities who have been released by the claimant.

Joint and Several Liability

A health care provider cannot be held jointly and severally liable for the non-economic damages of an injured claimant in a medical malpractice case. A health care provider's liability for non-economic damages is several only.

Collateral Sources

The restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff is removed. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums), in addition to introducing evidence of an obligation to repay the collateral source compensation.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The fundamental focus of these bills is protecting access and improving affordability of health care. We've worked for years on compromises, and it is time to work together to move forward and get the job done. The joint and several liability provision is a good provision, but we prefer the way it is addressed in Initiative 330 and think these issues should be addressed as a package.

(Neutral) Liability should be proportional so that you only pay for your blame.

Testimony Against: The elimination of joint and several liability for plaintiffs who are without fault implicates basic principles of jurisprudence. An innocent plaintiff should be fully compensated from the defendants who caused the harm. Since it is limited to non-economic damages, women, children, and the elderly will receive less recovery. It will also tend to increase the number of defendants since a claimant will have to sue everyone who is even peripherally involved. Juries are not designed to take an indivisible injury and allocate for non-economic damages, which is what the several liability provision will require.

Persons Testifying: (In support) Representative Lantz, prime sponsor; and Barbara Shickich, Washington State Hospital Association.

(Neutral) Kerry Watrin, family practitioner.

(Opposed) Mark Johnson, Washington State Bar Association; Cliff Webster, Washington State Medical Association; and John Budlong, Washington State Trial Lawyers' Association..

Persons Signed In To Testify But Not Testifying: None.